

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,

FM Broadcast Stations.
(Eminence, Missouri)

)
) DOCKET FILE COPY ORIGINAL
)
) MM Docket No. 01-151
) RM-10167
) RM-10567
)

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To: The Office of the Secretary
Attention: Assistant Chief, Audio Division

AUG 10 2005

Federal Communications Commission
Office of Secretary

OPPOSITION TO
JOINT PETITION FOR APPROVAL OF
AGREEMENT AND FOR OTHER RELIEF

KDAA-KMOZ, LLC ("KKL"), by counsel, hereby files this Opposition to "Joint Petition for Approval and for Other Relief" ("Joint Petition") filed by Four Him Enterprises, L.L.C. ("Four Him"), and Ozark Broadcasting, Inc. ("Ozark") in the above-captioned docket (Rulemaking proceedings Nos. RM-10167 and RM-10567). The Joint Petition requests the Audio Division to (A) approve the Agreement of Settlement between Four Him and Ozark; (B) Dismiss Ozark's application (File No. BPH-20030401ABZ) for full class facilities of Station KJEL, Lebanon, MO; (C) reconsider the *Memorandum Opinion and Order, Lebanon, Missouri*, DA 05-1715, released June 24, 2005 ("MO&O"); and (D) resolve the proceedings in Docket No. 01-151 without allocating Channel 276C3 to Eminence, Missouri. Four Him would pay Ozark \$100,000 for its cooperation. KKL is not a party to the Agreement of Settlement between Four Him and Ozark.

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KKL is licensee of Station KDAA, Channel 248A at Rolla, MO, that would be directly affected by the outcome of this proceeding.¹ KKL requests that the Audio Division dismiss the Joint Petition as procedurally defective and violative of KKL's rights under Section 316(a)(1) of the Communications Act. In short, the Commission cannot modify KKL's license for KDAA without first issuing an Order to Show Cause on KKL. In opposition, the following is shown:

On April 23, 2001, Four Him filed a Petition for Rule Making seeking to upgrade its station KHCN (now KHZR) from Channel 249C3 to 249C2 at Potosi, MO. That would require, *inter alia*, the substitution of Channel 276A for Channel 248A at Rolla, MO and the modification of KDAA's license. By *Notice of Proposed Rule Making (Eminence, MO, Encinal, TX and Tilden, TX)*, 16 FCC Rcd 13915 (Alloc. Br. 2001), the former Allocations Branch of the Audio Services Division² set forth separate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Rules. One of those proposals, by Ozark was to allot Channel 276C3 to Eminence, MO, as its first local aural transmission service at reference coordinates: 37-16-07 NL and 91-15-05 WL. Ozark's proposal for Eminence would not affect KKL. However, on September 4, 2001, the date for filing comments, Four Him filed a counterproposal in this docket essentially duplicating its April 23, 2001, proposal. In addition to the change of channels at Rolla, Four Him's proposal would also require the downgrade of Station KJEL(FM), Lebanon, MO, from Class C to Class C0.³

On September 20, 2002, the Commission released an *Order to Show Cause* (DA 02-2225) requiring Ozark to show cause why KJEL should not be downgraded to Class C0 status. Ozark

¹ KKL is seeking leave to file this Opposition in a separate pleading being filed today.

² Now, the Audio Division, Media Bureau.

³ Four Him also requires the substitution of Channel 248A for Channel 276A at Linn, MO.

maintained that it never received a copy of the Order to Show Cause by certified mail, and that when it learned of the proposed KJEL downgrade, Ozark belatedly filed a response to the *Order to Show Cause* and on April 1, 2003, Ozark filed an application (File No. BPH-20030401ABZ), to maintain Class C status.

The Commission dismissed Four Him's petition for rule making in RM-10567 that proposed the substitution of Channel 249C2 for 249C3 at Potosi because Ozark objected to the downgrade of KJEL to Class C0. On August 23, 2003, Four Him filed a petition for reconsideration of the Commission's action and Ozark opposed it. That petition was denied in *Memorandum Opinion and Order*, DA 05-1715, released June 24, 2005 ("MO&O"). On July 25, 2005, Four Him filed a Petition for Reconsideration of the MO&O.⁴ The Audio Division found that Ozark had "a statutory right to be notified of the proposed modification of the Station KJEL license and an opportunity to file a response," citing *Fostering the Expanded Use of UHF Television Channels (Stockton and Modesto, California)*, 4 FCC Rcd 2d 839 (1966). Since the Commission did not provide Ozark with notice, the Four Him Petition for Rule Making was dismissed.

Because the litigation was ongoing and the Commission had not acted, on July 12, 2004, KKL filed a "Statement for the Record and Request for Expedited Action on Application and Request to Update FM Data Base." Therein, KKL took no position on how the subject matter of the litigation should be resolved, but noted for the record that the pendency of the rule making petitions had prevented action on KKL's application (File No. BPH-20030701AMT) to relocate the

⁴ KKL is filing a separate opposition to the petition for reconsideration and motion to accept late-filed pleading.

antenna of KDAA, Rolla, MO, to the site shared by station KZNN, Rolla, MO, which is licensed to an affiliate of KKL. KKL showed that either Channel 248A or Channel 276A could be utilized/operated from the site specified in the application meeting all minimum distance separation requirements, assuming the other changes proposed in the Four Him proposal are made. As a result, on June 14, 2005, the Audio Division granted KKL's application conditioned on the outcome of this proceeding. Any construction of the facility would be at KKL's risk.

With the Audio Division's denial of Four Him's Petition for Reconsideration in the MO&O, KKL thought this matter was settled and that KDAA would not be required to change its operating channel. KKL opposes the Joint Petition because it violates applicable law. There are at least three major flaws in the Joint Petition that require its dismissal. First, the Joint Petition violates the requirements of *Window Notice for Universal Settlements of Pending Rule Making Proceedings to Amend the FM Table of Allotments*, DA 05-1688, released June 20, 2005 ("Window Notice") under which the Joint Petition was ostensibly filed. The Window Notice restricts eligibility to parties who filed timely expressions of interest in rule making proceedings where a Notice of Proposed Rulemaking ("NPRM") was released on or before June 14, 2005. No NPRM has been released in RM-10567, the proceeding where Four Him proposed the modification of the license of KDAA, so RM-10567 is not eligible under the Window Notice. As a second ground, in MM Docket 01-151, Four Him filed a counterproposal that proposed the modification of the license of KDAA, but that counterproposal never appeared on public notice. As a result, KKL never had an opportunity to respond to the counterproposal. As a third ground, the Joint Petition proposes to modify the license of KDAA, but the Commission has not issued to KKL an *Order to Show Cause*

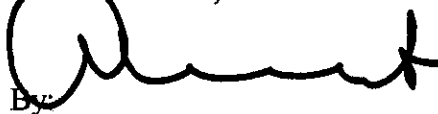
pursuant to Section 316 of the Communications Act, as the Audio Division's MO&O teaches, is an applicant's right.

While KKL stated that it was willing to accept a construction permit for KDAA conditioned on the outcome of MB Docket 01-151, such statement does not amount to an abandonment of KLL's rights. Unless, and until, KLL is served with an Order to Show Cause and given an opportunity to comment, its license cannot be modified.

In light of the foregoing, KKL respectfully requests the Audio Division to dismiss the Joint Petition and reject the Agreement of Settlement.

Respectfully submitted,

~~KDAA~~ KMOZ, LLC

A handwritten signature in black ink, appearing to read "Gary S. Smithwick", written over a horizontal line.

By

Gary S. Smithwick
Its Attorney

Smithwick & Belendiuk, P. C.
5028 Wisconsin Avenue, NW, Suite 301
Washington, DC 20016
202-363-4560
August 10, 2005

CERTIFICATE OF SERVICE

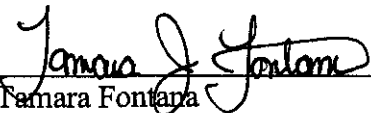
I, Tamara Fontana, do hereby certify that a copy of the foregoing **OPPOSITION TO JOINT PETITION FOR APPROVAL OF AGREEMENT AND FOR OTHER RELIEF** was mailed by First Class U.S. Mail, postage prepaid (or hand delivery, as marked with an asterisk), this 10th day of August, 2005, to the following:

Lauren A. Colby, Esquire
Law Office of Lauren A. Colby
10 East 4th Street
Frederick, Maryland 21701
Counsel for Ozark Broadcasting, Inc.

A. Wray Fitch, III, Esquire
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, Virginia 22102-3807
Counsel for Four Him Enterprises, L.L.C.

Barthen Gorman, Esquire
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert Hayne, Esquire
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554


Tamara Fontana